Department of Law Monthly Report

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In This Issue

Office of the Attorney General

Botelho and Other Commissioners Support National Guard and Reserve

Attorney General Bruce Botelho recently signed a "Statement of Support for the Guard and Reserve" in recognition of the essential role of the National Guard and Reserve in preserving the strength of the nation and the well-being of Alaska's communities. The statement, which was also signed by Governor Tony Knowles and by the commissioners of executive branch agencies, includes a pledge that the employer will: (1) not deny employment because of service in the Guard or Reserve; (2) not limit or reduce employee job and career opportunities because of such service; and (3) grant leaves of absence for military training in the Guard or Reserve, consistent with existing laws, without requiring employees to sacrifice vacation time.

As one of the largest single employers of Guard and Reserve members in Alaska, the executive branch is committed, according to Governor Knowles, to supporting those employees and to adhering to the Uniformed Services Employment and Reemployment Rights Act.

Collections & Support

Nearly $3 Million From 2001 PFD Attachment Collected

In October 2001 the Collections Unit filed one complaint to reduce an OSHA penalty to judgment and seven other pleadings. Demand letters were sent to fifteen OSHA debtors, two OSHA cases were closed, and one was opened. On the criminal side, we have received $2,880,994.34 from the 2001 PFD attachment so far and have posted $610,761.66 of these payments. We responded to hundreds of telephone inquiries and sent 47 letters responding to written inquiries from defendants and courts regarding the PFD attachment. We requested 39 new refunds be issued and distributed 47 refund checks to defendants, courts, and other agencies. Quarterly collection reports were prepared for OSHA, APOC, the Department of Corrections, and the Alaska Court System. In addition, the unit has met with the court rules subcommittee to finalize proposed changes to the rules regarding restitution collection, and the unit is working on finalizing the forms, procedures, and regulations.

Court Enters Support Order Imputing Income

AAG Pamela Hartnell obtained a support order imputing income to a voluntarily underemployed truck driver. Although the obligor, Kevin Groom, has a spotty work record, he has a commercial driver's license and recent truck driving work history. Because he did not provide the income information required to calculate his support obligation, CSED imputed his income based on his skills, ability, and work history. In response to CSED's motion, Groom claimed that he suffers from depression and could not work during 1999. He further claimed that he lived on $14 unemployment and the PFD for that year. A hearing was held on September 12, 2001, at which Groom testified about his depression and his inability to work. The court subsequently issued an order, imputing income to Groom based on $11 per hour (lowest rate for truck driver).

Court Sanctions Parent In Support Case

AAG Terisia Chleborad obtained a judgment of approximately $2,000 as a discovery sanction against a parent who refused to produce discovery regarding his business. The parent is self-employed as the owner and operator of a pizza restaurant. He argued that because his business was incorporated and because the business paid him a salary, his only income for child support purposes was the salary declared on his W-2 form. However, since any profit that the restaurant realized belonged ultimately to the parent as the primary shareholder of the closely held corporation, CSED and Ms. Chleborad requested that the obligor produce evidence of the restaurant's income. The court granted CSED's request. The restaurant's financial records showed that, in addition to the parent's reported income, the parent took draws from the business, the business paid some of the parent's personal expenses, and the business had income in addition to the wages that the parent paid himself. Judge Michalski awarded CSED the full amount of attorney's fees incurred in having to compel discovery.

Divorce Settlement Applied To Support Arrearages

In *Thorne v. Cowdery*, a divorce action involving no children, the court ordered the wife to pay the husband $30,000, through the court clerk as part of the parties' property settlement. The wife complied. Before doing so, however, the wife informed CSED of the court order, intimating that the husband might owe child support in other cases. Sure enough, CSED determined that the husband owed over $41,000 in child support arrears to children from two previous marriages. AAG Richard

Sullivan filed a limited entry of appearance and motion on CSED's behalf, informing the court and parties of the husband's support obligation and asking the court to release the funds to CSED in partial satisfaction of the arrears. The court complied, disbursing the entire amount as requested.

Commercial Section

Regulatory Commission of Alaska

AAG Virginia Rusch assisted the Regulatory Commission of Alaska in preparation of a number of commission decisions, including decisions on interim rates for Chugach Electric Association, UNE (unbundled network element) rates for ACS, and issues raised after the recent Golden Heart Utilities rate case. She also completed the agency attorney review of the Regulatory Commission's recently adopted slamming regulations, and completed a bill drafting assignment to prepare a sunset extension bill for the Regulatory Commission.

City Mortgage Bankruptcy

AAG Mary Ellen Beardsley and outside counsel assisted the Alaska Housing Finance Corporation (AHFC) in bringing an involuntary bankruptcy proceeding against City Mortgage Corporation. On September 28, 2001, AHFC and two other creditors filed a petition to put City Mortgage into a Chapter 11 bankruptcy. The action followed news stories and consumer complaints that City Mortgage was mishandling customers' funds due to its own financial problems. At a hearing held on October 5, 2001, City Mortgage voluntarily agreed to remain in bankruptcy. Prior to AHFC filing a motion for the appointment of a trustee in the Chapter 11, City Mortgage agreed to convert to a Chapter 7 and Larry Compton has been appointed the trustee.

Staten v. PFD Division and ASLC

AAG Mary Ellen Beardsley is representing the Alaska Student Loan Corporation (ALSC) and the Alaska Commission on Postsecondary Education (ACPE) in a claim brought by Shirley Mae Statten who owes ASLC in excess of $25,000 on 5 loans. Ms. Statten recently filed suit against the ASLC, ACPE, and the PFD Division asking the court to order that the 1996, 1997, and 1998 PFDs she never applied for be credited against her outstanding student loan debt. The facts are that in 1995 ACPE seized Ms. Statten's 1995 PFD and applied it to her loans. She claims that the language of the notice from ACPE led her to believe that ACPE would apply for and then seize her future PFDs and credit them to her debt. Therefore, she failed to apply for PFDs in 1996-1998. When she finally figured out that ACPE had not received her PFDs for 1996-1998, she retroactively applied in 2000 for those years. The PFD Division denied her applications as untimely. AAG Dan Branch represents the PFD Division in the litigation. It is ASLC/ACPE's position that Ms. Statten's reliance on them to apply for her dividends was unfounded, especially since ACPE had previously seized her 1992 and 1994 PFDs without later applying on her behalf.

16-Year-Old Pt. Mackenzie Case Finally Settles!

The state reached agreement with plaintiffs to end the litigation in *Kashwitna Farms, Harry Wassink and Consuelo Wassink v. State*. This settlement resolves the last litigation that stemmed from the initial agricultural development on Point Mackenzie. The state agreed to take back Tract 8, a 475-acre parcel, and remaining farm equipment and improvements in lieu of the outstanding debt on the land contract and loans. The Board of Agriculture and Conservation plans to dispose of Tract 8 in 2002. The most recently involved assistant attorneys general in the long history of this case were Kevin Saxby, Rob Nauheim, and Elizabeth Hickerson.

Fair Business Practice

State Medical Board Summarily Suspends Physician's License

On October 26, 2001, the State Medical Board summarily suspended the medical license of Nome osteopathic physician Jim E. Lewis based on AS 08.64.331(c), which provides for such suspensions where the licensee poses a "clear and immediate danger" to the public health and safety. The board also ordered Lewis to submit to certain medical and psychiatric evaluations pursuant to AS 08.64.338. The orders were based on expert reports from (1) an osteopathic physician who concluded that Lewis was engaged in inappropriate touching of female patients, and (2) a clinical psychologist who determined that Lewis likely presented a danger to female patients. Lewis was provided an opportunity for a hearing within 7 days of the suspension, pursuant to AS 08.64.331(c), but chose instead to pursue an injunction setting aside the suspension (which was ultimately unsuccessful) in Nome Superior Court. No hearing date on the suspension has been scheduled. AAGs Roger Rom and Robert Auth are representing the Division of Occupational Licensing in the administrative and superior court proceedings.

Professional Teaching Practices Commission Revokes Teacher and Principal Certificates

Following a two-day hearing handled by AAG Roger Rom, the Professional Teaching Practices Commission revoked the teacher and principal certificates of an educator who propositioned his step-daughter by asking her to become his personal prostitute. The case originated in 1992 and has involved numerous AAGs through hearing, appeal to the Anchorage Superior Court and Alaska Supreme Court, and re-hearing before the commission.

Standards for Investments of Insurance Companies Updated

AAG Signe Andersen completed the legal review of a 116-page regulation project for the Division of Insurance. This project updates Alaska's standards for regulating investments of domestic insurance companies doing business in Alaska. In particular, the regulations reflect changes in the kinds of investments made by insurance companies and establish a framework for new investment limitations that are consistent with limitations in other states. The regulations are based on a model law adopted by the National Association of Insurance Commissioners. The overriding purpose of the regulations is to protect Alaska insureds by ensuring that domestic insurers make good quality investments and diversify holdings to preserve the ability to pay claims when due.

Enstar Gas Contract with Unocal

This case was before the RCA on review of a proposed gas supply agreement (GSA) between Enstar and Unocal. Enstar wanted the RCA to approve this GSA, which required Unocal to spend at least $11.5 million to explore for new gas supplies in Cook Inlet. The goal, according to Enstar, is to expand new reserves of gas for Cook Inlet, which is currently running out of gas for local consumers. The GSA provided little in the way of a firm gas commitment, but allowed Unocal a first right of refusal to supply all of Enstar's gas needs prospectively at the GSA's new pricing mechanism. The Public Advocacy Section (PAS) and intervenor Marathon Oil Co. objected to the proposed GSA. The PAS, through AAG Steve DeVries, argued it was not in the public interest for the RCA to approve the GSA because: (1) it is an anticompetitive exclusive dealing contract, which, if approved, will make Unocal the dominate market gas provider for local gas needs; (2) it wrongfully uses a Lower 48 pricing baseline (Henry Hub), which has no correlation to the local market and will substantially drive up gas prices to

local gas consumers; and (3) it forces Enstar's rate payers to subsidize a "risky" exploration contract because all risks are directly passed through to Enstar's rate payers, instead of requiring Enstar's shareholders to shoulder the exploration risks.

On October 26 the RCA issued its decision approving the GSA. A reconsideration request was filed by the PAS on 11/7.

Alaska Supreme Court Rules for AHFC in Sprucewood Investments & Northern Construction Case

On October 19, 2001, the Alaska Supreme Court issued a decision in favor of AHFC on all issues in this case. The case involved a dispute over a demolition contract issued by AHFC to demolish old housing units in a public housing development owned and operated by AHFC in Fairbanks. The contractor, Northern Construction, instead of demolishing the buildings secretly sold them to Sprucewood for $150,000. When AHFC found out, it got a TRO to keep Sprucewood from doing anything further to the buildings and then summary judgment based on a breach of contract theory. Northern had argued to the superior court and to the supreme court that it was permitted to sell the buildings because the contract's demolition term was ambiguous. The supreme court disagreed. AAG Steve DeVries represented AHFC in this matter.

Governmental Affairs

Employment Trial Delayed

Four days before trial was to begin, Superior Court Judge Rene Gonzalez granted a former state employee's motion to consolidate his suit against his former union with his suit against the state. In granting the motion to consolidate, Judge Gonzalez also delayed trial, which was scheduled to begin November 5. The former state employee alleges that the state violated the implied covenant of good faith and fair dealing by withdrawing a job offer after he accepted the offer. He alleges that his former union – the Alaska State Employees Association – violated its duty of fair representation by failing to file a grievance about the offer withdrawal before the grievance-filing deadline passed. Trial of the consolidated cases is now scheduled for August 12, 2002, before Judge Sen Tan.

Former Kitchen Steward Claims Constructive Discharge

A former kitchen steward at Spring Creek Correctional Center has sued the state and his former supervisors, claiming that they constructively discharged him from his employment. The former steward, representing himself, alleges in his federal-court complaint that he could no longer work in the Spring Creek kitchen because he concluded that his supervisors had falsely assured him that inmate kitchen workers had received medical clearance to work in the kitchen. The former steward seeks $750,000, plus punitive damages.

Human Services

Bomengen Leads Welfare Attorneys

On October 3, 2001, AAG Kristen Bomengen was elected President of the American Association of Public Welfare Attorneys (AAPWA) at the organization's 34th Annual National Training and Continuing Education Conference in Chicago. AAG Bomengen just completed a year as Vice-President, during which she served as conference chair for the October CLE program, and she will serve as the AAPWA President in 2002. The AAPWA is an affiliate of the American Public Human Services Association (APHSA) and is open to membership to attorneys who advise state and

local public welfare and human services agencies.

Juneau Court Rules Against State In Parental Rights Case

In late October the state sought to terminate the parental rights of a mother. Assistant Attorney General Jan Rutherdale presented uncontradicted evidence in this Indian Child Welfare (ICWA) case that: (1) the two children (ages 5 & 6) have serious learning disabilities and are at high risk of mental illness and FAE; (2) they would be likely to suffer serious emotional damage, short and long term, if they were removed from their foster mother who has raised them for the last four years; (3) it is unlikely that the mother will ever be able to safely parent the children on her own outside of short periods of unsupervised and unstructured visitations; and (4) an adult son in the home had a drinking problem and twice had been arrested for domestic violence against the mother and her current husband.

The court found in favor of the state on every ground needed for termination, including that it would be in the children's best interests to terminate parental rights, except the court did not find that there was evidence beyond a reasonable doubt that there is a likelihood that the children would suffer serious emotional or physical damage if returned to the mother. Judge Weeks stated that he couldn't make that finding required under ICWA, because the mother has been sober for three years, ended a relationship with her former abusive spouse (and her current husband is not violent), and has been successfully discharged from a mental health program. The state has filed an appeal of the court's decision.

Legislation/Regulations

Department Prepares Bills For Governor's Consideration For 2002 Legislative Package

During October 2001 the Legislation and Regulations Section assisted the Office of the Governor by assigning legislation drafting projects to assistant attorneys general and began editing completed projects. The drafts of legislation were then forwarded to the Office of the Governor for the governor's consideration.

The section conducted legislative bill typing training classes for law office assistants in Anchorage, Juneau, and Fairbanks. Over 50 law office assistants attended the training. We appreciated everyone's attention and cooperation to make the classes successful.

The section held a major planning meeting with the Department of Fish and Game and assistant attorneys general assigned to the department's regulation projects. Timelines were set for the editing of these time-sensitive projects.

The section also processed regulations for the Department of Labor and Workforce Development on the STEP program and unemployment insurance benefits; the Regulatory Commission of Alaska on "slamming" by telecommunication carriers; State Board of Education and Early Development school bus safety requirements; Department of Fish and Game fees for nonresident crewmember licenses; and regulations for several occupational licensing boards.

Natural Resources

Commercial Fisheries Entry Commission Decision Upheld

Ending a twenty-three year dispute, the Alaska Supreme Court upheld the decision of Superior Court Judge Brown affirming a CFEC administrative decision to deny a limited entry permit to the estate of Vasily A. Basargin for the Prince William Sound salmon drift gillnet fishery. The points on appeal involved due process and point disallowance. Basargin's application was governed by regulations adopted in 1974 that rank individual applicants on a point system according to their relative dependence on the fishery. The supreme court rejected Basargin's arguments and attached Judge Brown's decision as an appendix, finding that the superior court had expressed its decision well.

Koyukuk River Basin Moose Co-Management Team v. Board of Game, et. al.

On October 3, 2001, we received a memorandum decision and order from the superior court in *Koyukuk River Basin Moose Co-Management Team v. Board of Game, et al.* Judge Green in Fairbanks granted the board complete summary judgment on all the claims raised by the team. They had alleged, in a repeat of earlier litigation, that the existing hunting seasons, bag limits, and management goals for moose in the Koyukuk River drainage violated both the state subsistence statute and the sustained yield clause. Judge Green's thoughtful, 38-page opinion illustrates that she spent a great deal of time reviewing the complex board record in this case, as well as the arguments and case law on point. The opinion is a good model for any attorneys facing similar issues.

Cook Inlet Beluga Whales Litigation

Litigation over the decision not to list Cook Inlet beluga whales as endangered under the state's Endangered Species Act is awaiting a ruling on a discovery dispute. The state has asserted the deliberative process privilege applies to four documents that were prepared in the course of consideration of the plaintiffs' petition. The plaintiffs contend the deliberative process privilege does not apply to any document with a connection to rulemaking under the Administrative Procedure Act. The issue has been briefed and is before Judge Tan.

Red Dog Settlement

The Fairbanks office assisted ADEC in settling a case with Cominco Alaska, involving violations of the company's air permit at the Red Dog Mine. Under the settlement, ADEC imposed a civil penalty of $827,000, of which it suspended $248,100 based on Cominco's compliance with the settlement. Cominco will pay $300,000 and spend at least $278,900 on three supplemental environmental projects in the area. Cominco will also develop an environmental management system that meets stringent international standards and will improve its plan for regulating truck traffic on the haul road from the mine to the port.

Greens Creek Bond

AAG Cam Leonard in the Fairbanks office assisted ADEC in negotiating a larger bond for securing proper operation and reclamation of the Greens Creek Mine near Juneau. The existing interim bond was for $6 million. As part of a new solid waste disposal permit that gives heightened attention to the issue of potential acid mine drainage, the company offered to raise the bond to about $21 million. After consultation between state agencies and the U.S. Forest Service, we were able to negotiate a revised bond of $24.4 million. This is the largest bond the state has ever required as part of such a permit.

Oil, Gas & Mining

Corporate Income Tax Case Resolved

The State of Alaska and BP Exploration (Alaska), Inc. resolved a corporate income tax case concerning Atlantic Richfield Company's outstanding tax liability for tax years 1994-1998. Under the terms of the agreement, BP agreed to pay $36 million in additional tax and interest. The funds were deposited in the Consitutional Budget Reserve. AAGs Tina Kobayashi and Virginia Ragle assisted the Department of Revenue in this case.

Point McIntyre Unitization Case

For several years, we have reported the progress of Exxon's appeal of two decisions of the Commissioner of Natural Resources regarding unitization of the Point McIntyre leases. The commissioner's decisions denied Exxon's application for deferral of contraction of a portion of the Point McIntyre reservoir out of the Prudhoe Bay Unit and also denied Exxon's application for expansion of the unit to include all of the Point McIntyre leases. The commissioner's decisions prevented Exxon from deducting more than $0.80 per barrel in field costs from its royalty payments for Point McIntyre oil. Exxon was unsuccessful in its appeal to the superior court. On October 12, 2001, the Alaska Supreme Court ruled in favor of the state, affirming the commissioner's expansion decision and holding that affirmation of the expansion decision disposed of the other issues in the case. Exxon has petitioned for rehearing. AAG Virginia Ragle represents the state in this matter.

Texaco Cook Inlet Oil Royalty Matter

DNR and Texaco have resolved the state's claims for additional royalties for Texaco's Cook Inlet oil production during the period March 1987 through August 1992. Texaco paid $420,612 in additional royalties and interest. AAG Virginia Ragle negotiated the settlement for the state.

Special Litigation

Negligent Vocational Rehabilitation Claims Rejected

AAG Randy Olsen obtained summary judgment on tort claims brought against the Division of Vocational Rehabilitation (DVR).

The claims involved DVR's efforts to help a 59-year-old woman claiming a disability arising out of alcohol abuse to begin running a pig farm. She brought suit after a fire in her barn destroyed some of her livestock and business. The suit alleged negligence in conducting her rehabilitation, as well as emotional distress arising out of the deaths of her pigs. While the situation was certainly unfortunate for all concerned, the court ruled that administrative remedies had not been exhausted and that no cause of action for emotional distress could be brought for the death of livestock being raised for slaughter.

Transportation

Alaska v. Norton, United States, William T. Bryant, No. A94-0301-CV (HRH)

The federal district court decision on the merits in a highway right-of-way / Native allotment conflict is now reported as *State of Alaska v. Norton*, ___ F.Supp.2d ___ (D.Alaska 2001). It is also reported in Westlaw as 2001 WL 1262932 (D.Alaska Apr. 19, 2001). The decision is reported as a result of this office having taken the initiative to contact West Publishing to recommend that the decision be published. It has already been cited by the Alaska Supreme Court in the recent decision of *Foster v. State* , which is described below.

Foster v. State, Alaska Supreme Court Op. No. 5504

On appeal the Alaska Supreme Court affirmed that state courts were without subject matter jurisdiction over Foster's action for trespass and damages based on her claim that the Parks Highway unlawfully crossed her native allotment. Federal jurisdiction is exclusive with respect to adjudication of rights to land held in trust by the federal government for Alaska natives. The court also affirmed the award of attorney's fees and costs to the state, notwithstanding that the superior court lacked subject matter jurisdiction over Foster's action.

The net effect of the decision is that if Foster wishes to proceed with her trespass claim, Foster will have to convince the federal government to sue the state in federal court. (Foster cannot sue the state in her own name in the federal court because of the 11th amendment.) The federal government will undoubtedly be reluctant to do this. Previously, the federal government went to great effort to have the state's federal action for judicial review of the approval of Foster's allotment (and voiding of the Parks Highway right-of-way where it crossed the allotment) dismissed on the basis of the federal government's sovereign immunity. See, *Alaska v. Babbitt* (Foster), 75 F.3d 449 (9th Cir. 1996). If it now sued the state concerning Foster's allotment, that would waive sovereign immunity, and the state would then counterclaim for judicial review of the agency approval of her allotment on the highway right-of-way. Meanwhile, the state remains in possession and control of the Parks Highway.

Right-of-Way Upheld

In *Safeway, Inc. v. State* (No. 5492 - Nov. 2, 2001), a quiet title action involving state right-of-way, the Alaska Supreme Court ruled that the Municipality of Anchorage could not vacate a road right-of-way claimed by the state. A strip of land that had been dedicated to the public for right-of-way was accepted by the local government and later included in a state right-of-way map. The local government subsequently vacated the right-of-way and the owners claimed that vacation was effective as to the state.

The supreme court ruled that the state had accepted the dedication by including the right-of-way in its highway maps and that local governments have no power to vacate the state's rights in land acquired for highway purposes.

The court also addressed the issues of whether the doctrines of estoppel or quasi-estoppel barred the state from claiming an interest in the right-of-way and found that discussions between state officials and the lessees of the land in issue did not warrant the application of either doctrine. AAG Susan Urig represented the state.

Billboard Law Upheld

The superior court issued a favorable decision in *Lamb v. State*. Lamb challenged the constitutionality of Alaska's laws governing billboards and other signs along state highways because those laws limit the manner in which political campaign signs can be posted on private property. Judge Gleason ruled that Lamb lacked standing to bring this claim. AAG Jim Cantor represented the state.

Criminal Division

ANCHORAGE

Justin Williams, Justin Dufour, and Adam Ramadanovic were sentenced for sexually assaulting a 14-year-old girl. A fourth co-defendant, Hershell Shelton, has been severed from the three. In June 1999 the girl was taken into a bedroom during a party and forced to perform oral sex on all the defendants.

Ramadanovic also vaginally raped her and threatened her with a gun. The jury hung on the sexual assault in the first degree for all three defendants. However, the jury convicted all three on the charge of sexual abuse of a minor in the second degree. The fourth co-defendant pled to sexual abuse of a minor in the second degree. Ramadanovic was also convicted of one count of assault in the third degree. Sentencing was as follows: 1) Ramadanovic received four years with two suspended for the sexual abuse and consecutive two years for the assault; 2) Dufour received eight years with four years suspended; 3) Williams received six years with three suspended; and 4) Shelton received six and a half years with three years suspended. All defendants were placed on ten years probation.

Velma Jean Sharp has twice tried to prevent her 34-year-old son from being charged with sexually abusing minors. In 1989, Sharp and her husband fabricated a story that their son had killed himself and showed police his suicide note. When he was located he was convicted of sexual abuse. After his release from prison in 1999, the son was charged with sexually abusing an 11-year-old girl. Sharp told the victim not to tell authorities. She was sentenced to 365 days with 275 days suspended and two years probation for attempted hindering prosecution. Sharp's son is scheduled for trial in January 2002.

A 20-year-old man was indicted by a grand jury on murder in the second degree for shaking a baby. Talalelei Edwards was babysitting for his roommate's 11-month old son when he brought the baby to the hospital for being unresponsive. The baby died later that night. An autopsy showed signs consistent with head trauma as a result of shaking.

Michael Jeffries was sentenced to 23 years in jail with 10 years suspended for murder in the second degree and one year each flat time for felony DWI and DWLS. This was Jeffries' seventh DWI conviction. Jeffries pulled in front of an on-coming vehicle as he was turning into a side street; his passenger was killed. His BAC was measured at 0.270.

BARROW

A Barrow woman was convicted at trial of assaulting her son. She came home intoxicated, announced that her son was the "devil", and stabbed his bedroom door with a butcher knife, trying to get in. He jumped out of the window with a young friend, and they went to the police station.

The grand jury did not meet during October.

BETHEL

Law Office Assistant Rhonda Peltola resigned effective the second week of October. We are looking for a replacement.

Three jury trials produced mixed results. Ambrose Aguchak was convicted of sexual assault in the first degree. Rodney Rhoden was found not guilty of misdemeanor domestic violence assault. Charlie Redfox was found not guilty of misdemeanor domestic violence assault in Emmonak.

The grand jury returned a number of indictments. Paul Patrick was indicted on three counts of burglary. Nathan Albright and Charlie Kilangak were indicted for sexual assault in the second degree. Richard Felix was indicted on one count each of attempted sexual assault in the first and second degree. Jason Ayagalria, Walter Ayagalria, and Kevin Kernak were charged with burglary and theft. Thomas Kameroff was indicted on one count each of kidnapping, sexual assault in the first degree, sexual abuse of a minor in the second degree, and sale of liquor without a license. Getrude Finch, Denise Asicksik, Sarah Engebreth, and Jeffery Evon were indicted on various counts ranging from first-degree sexual assault to second-degree assault.

CDCO

The District Attorney/Paralegal Conference, held October 5-6 in Girdwood, "Improving the Likelihood of Conviction (With Emphasis on Strangulation and Homicide)," was hailed as a great success with many rating it as the "best conference ever." Bruce Botelho and Cindy Cooper gave the conference a flying start with opening remarks. Cindy continued as MC. Many topics were squeezed into the first day, including two "traditional" departmental topics enjoyed by all: "Recent Alaska Appellate Court Issues" by Eric Johnson and "New Laws and Legislation" by Dean Guaneli. John Novak especially deserves praise for making an hour-long ethics presentation interesting ("Ethics: Doing the Right Thing for the Right Reason"). Richard Svobodny cleverly presented a "Good to Go Trial Notebook by a Highly Trained Professional" in an unbelievably concise 25 minutes (remember, he is an attorney)…but not without spending several minutes of that time complaining about the short time allotted for his topic. The audience appreciated Mike Stark and John Bodick who co-presented "Department of Corrections Issues That Affect Prosecutors." Harry Davis gave a memorable presentation on "Tips on Screening Cases and Meeting and Making Objections." Cindy Cooper, Diane Wendlandt, and Jody Lown teamed up for "Victim Restitution Issues" to bring folks up to speed on the new Restitution Collection Unit.

Thursday and Friday presenters included some dynamic outside experts. Gael Strack (San Diego City Attorney) and Dr. George McClane (San Diego Emergency Room Physician) received high ratings for "How to Improve Your Investigation and Prosecution of Strangulation Cases" and "Domestic Violence Injuries – From Head to Toe." Jacquelynn Seely (New Jersey prosecutor) provided education on using Power Point in trial and how to make other types of exhibits. Dan McCarthy (Bronx DAO) was excellent with "Homicide Trials from a Prosecutor's Perspective" and "Trial, Theme and Summation." Mr. McCarthy was highly entertaining and the crowd would have loved to hear more. He chilled everyone with World Trade Center photos, calling it the largest homicide case in the history of the United States.

A pleasant addition to this year's conference included dinner table topics for those wishing to participate. Several crime lab people helped to make the sexual assault and homicide tables a success: James Wolfe, Abi Chidambaram, and Jeanne Swartz. Senior attorneys chairing the tables included Cindy Cooper, Eric Johnson, Don Kitchen, Mary Ann Henry, and Eric Aarseth. The paralegals also had a table for discussion.

As in past years, awards were presented to recognize excellent work or to brighten the day with humorous event stories. Some recipients for excellent work: Carrie Hulse for a Community Service Recognition Award, Mary Fischer for getting a conviction in a difficult case, Christi Rhodes-Mestas for persevering through difficult back-to-back murder cases, and Sara Gehrig for difficult domestic violence prosecutions. Those who were targeted for good-natured humorous awards were John Novak (ethics award), Rachel Gernat (rescue award), and Mike Gray (I ain't no sissy award). Dean Guaneli entertained everyone with a segment of anagrams of department employees' names, including some very high-ranking officials (rumor has it that anagrams from "Cynthia M. Cooper" were quite interesting).

Finally, a special awards ceremony occurred during the dinner hour Wednesday evening. Bruce Botelho presented the awards for "Paralegal of the Year" to Vicki Matthews (Bethel DAO) and Terri Nault (Fairbanks DAO) and "Prosecutor of the Year" to Eric Johnson (OSPA) and Harry Davis (Fairbanks DAO). Dean Guaneli stole the show this year with a highly entertaining "Who Wants to Be Prosecutor of the Year" (following the format of "Who Wants to Be a Millionaire?") Dean, playing the part of Regis, made Harry Davis work to get his plaque by playing the game and

answering a series of prosecutor-related questions.

CORRECTIONS

Mike Stark provided a half-day training on legal issues to probation officers in Southeast and in Anchorage. He will finish his statewide training in Fairbanks in early December. Evaluations from probation officers gave high ratings for Mike's use of Power Point as an integral part of the training. Thanks to Jody Lown for training Mike on Power Point.

The state prevailed in an appeal in the supreme court involving perennial litigator Cyrus Braswell, who sued correctional officials and an assistant district attorney over alleged violations of constitutional rights related to his arrest and search of his residence in 1994. In *Braswell v. Pugh* [MOJ No. 1049 - October 10, 2001], the court upheld the trial court's dismissal of the complaint for failure to state a claim upon which relief can be granted, but also agreed with the state that additional reasons than those relied upon by the trial court supported the dismissal, i.e., immunity and statute of limitations.

KENAI

A jury found Cynthia Norman guilty of violating her conditions of release and acquitted her of resisting arrest. Despite the jury verdict, the trial court ruled that the state had proven the resistance by a preponderance of the evidence and considered that conduct in the sentencing on the B misdemeanor, violation of conditions, and on her numerous petitions to revoke probation on other offenses. The court imposed a total of 520 days to serve.

It was a tough month from a prosecution prospective for misdemeanor domestic violence trials on the Peninsula. A Homer jury acquitted a local mental health counselor of domestic violence assault after several hours of deliberation. A Soldotna man was also acquitted of a similar incident.

The grand jury indicted a former Texan, who had recently moved to Kenai to avoid prosecution for domestic violence against his wife there. The indictment was for kidnapping, assault in the third degree, and assault in the fourth degree. The defendant locked himself and his wife in their bedroom with a hasp and combination lock so she could not flee.

A Sterling man was indicted for sexual assault in the first degree on a girlfriend of his stepdaughter. During the investigation defendant admitted to sexually abusing his stepdaughter, but said that the family had decided to resolve it themselves. As part of the investigation a third victim was found to whom defendant had made inappropriate advances; this resulted only in a harassment charge because of the victim’s age.

KETCHIKAN

The three-week re-trial of Jose "Che" Mateu for the murder of his father ended in a hung jury and a mistrial.

An intoxicated Ketchikan woman crashed her car right in front of a Ketchikan police officer. Two of her three young children suffered minor injuries. She was charged with DWI and two counts of third-degree assault.

Bobby Dupre was indicted for a sexual assault that occurred late at night by a local restaurant.

A Hydaburg man was indicted for second-degree assault for hitting and kicking another Hydaburg residence in the head and body so badly that the victim was evacuated to Sitka for medical treatment.

Timothy Evans was indicted on three charges of second-degree sexual abuse of a minor and three charges of third-degree sexual abuse of a minor.

Jason Morgan was indicted for burglary in the first degree for breaking into a store in Wrangell.

A number of defendants were charged with drug offenses for possessing methamphetamine and other controlled substances. The drugs were discovered during searches incident to arrests on other offenses. Four defendants were indicted for second-degree thefts.

KODIAK

A 31-year-old Kodiak man was sentenced to 90 days in jail and fined $250 following his conviction for misconduct involving a controlled substance in the fourth degree, a class C felony. In May postal authorities had contacted Kodiak narcotics detectives after intercepting a package containing two pounds of marijuana being shipped to Kodiak. In a joint operation (no pun intended) between the narcotics unit of the Kodiak Police Department and the Alaska State Troopers' Statewide Drug Task Force this package was then delivered to the defendant in a controlled and monitored delivery. The defendant was arrested when he attempted to leave his hotel room about 15 minutes later. After pre-trial motions to dismiss the indictment were denied, this defendant pled to the charge.

Kodiak welcomed a new paralegal. Long-term paralegal Leslee Zeloof retired in June after 10 years of distinguished service. We were fortunate enough to be able to lure Robbin Kessler away from the Kodiak court clerk's office to replace her. Robbin had spent the last six years as the criminal clerk and comes to us with a great working knowledge of how things run . . . or need to. We could not have asked for a better paralegal and Robbin is already proving herself invaluable.

KOTZEBUE

October saw an increase in alcohol and drug-related cases as the Western Alaska Alcohol and Narcotics Taskforce began making its presence felt. Trina Smith was indicted for manufacture of alcohol without a license or permit. Smith has a prior conviction for importation of alcohol. Allen Downey pled out to a reduced charge of attempted alcohol manufacture and received a maximum one-year sentence. Assistant DA Windy East, to the great satisfaction of Judge Erlich, has been making a successful effort to get many misdemeanor cases resolved at arraignment. The time spent at those initial appearances has increased, but the effort has served to substantially reduce the number of cases pending.

NOME

Sexual assault cases continued to dominate the Nome caseload, with several new cases coming in and others clogging up the trial calendar. Isaac Okleasik was indicted for a sexual assault on an incapacitated victim, his girlfriend's mother. Vernon Kugzruk, an elderly defendant, took the opposite route and was charged with a sexual assault on a substantially younger (and also incapacitated) victim. Both of these offenses took place in the village of Teller. Sexual assault cases from St. Michael, Unalakleet, Shaktoolik, and Nome were all continued until the November trial calendar, awaiting lab reports or other follow-up.

Daniel Ahmasuk, of Nome, was indicted for the burning of a large piece of heavy equipment over the summer, causing an estimated $20,000 in damage. Ahmasuk was part of an underage drinking party on the beach; someone apparently felt that damaging the nearby equipment would add to the evening's entertainment. One other individual, a juvenile, has been implicated in the vandalism.

A Nome jury acquitted Roger Willoya in a domestic assault case, apparently finding some credibility in Willoya's claim that the alleged victim was the actual aggressor.

PALMER

After three trials over almost two years, a Glennallen jury convicted Larry Gondek of assault in the fourth degree (fear assault). The first trial was a mistrial during jury selection when Gondek claimed he was too ill to proceed. The second trial was a hung jury. Prior to the third trial and despite his having lost multiple pro per appeals in both state and federal court, Gondek decided he could do a better job than his court-appointed counsel. He started the third trial himself. Prior to cross examination of the victim, he asked the judge to allow the court-appointed counsel, who was sitting in the back of the courtroom as "stand-by counsel," to take over. There was work-related disagreement between Mrs. Gondek, who is a teacher in an outlying school, and the school administrator. Gondek had gone to the supervisor's office in the Glennallen elementary school. He told the supervisor that he would "meet his maker if (he) didn't stop harassing Mrs. Gondek." The jury agreed with the state that elementary schools should be sanctuaries. Young children should not even risk being exposed to irate adults. Gondek received 95 days, with 90 days suspended, plus probation.

In another difficult case, a Palmer jury convicted Lester Black of four counts of violating a domestic violence restraining order. Black had called his mother-in-law's home to tell the children that he loved them. The mother-in-law did not know he was not to be calling. He claimed that the order was confusing. He was sentenced to 24 hours community work service, suspended jail, and probation.

David Hyde was sentenced to seven years with three years suspended for his plea to sexual abuse of a minor in the second degree. Hyde was already on felony probation for felony assault and coercion. He received an additional nine months to serve.

OSPA
(Office of Special Prosecutions & Appeals)

Personnel News

Mike Burke, formerly of the Anchorage District Attorney's Office, began work as OSPA's alcohol-interdiction prosecutor. He will prosecute bootlegging cases arising in Nome and Kotzebue and the surrounding villages.

Eric Johnson resigned to accept a position with the Office of the New York State Attorney General. Eric will be replaced by two "chiefs": Brian Clark will supervise OSPA's trial prosecutors, and Doug Kossler will supervise OSPA's appellate lawyers.

Prosecution News

Bijan convicted of nonsupport. Adam Bijan, 52, of Fairbanks was convicted of two counts of criminal nonsupport after a jury trial. Bijan owes more than $122,000 in child support for two sons and two daughters. Acting District Court Judge Winston Burbank imposed a composite sentence of 540 days with 520 days suspended (20 days to serve). The judge also imposed a $1,000 fine for each of the two counts, with the fine suspended on the condition that Bijan make child support payments and complete three years of probation.

Bowerman sentenced for forgery. On October 10, Stephen Bowerman was sentenced on one consolidated count of forgery. He received a sentence of 5 years with 2 years suspended. The restitution is still undecided, but the state is asking for $20,000 for the victims. Bowerman conned an elderly couple into "going into business" with him, then took advantage of their trust (while the husband was having heart surgery in Seattle) by applying for a credit card in the husband's name and forging "convenience checks" sent to the husband by the credit card company.

Chena Hot Springs Resort sentenced. After over a year of litigation and seven motions to dismiss, all of which were denied, Chena Hot Springs Resort, LLC, was sentenced on a reduced charge of failing to adequately chlorinate its pools and hot tubs. The resort had hoped for a suspended imposition of sentence, but abandoned that hope after the state presented evidence showing that the management had instructed employees to falsify pool records and expert testimony on the various diseases that are communicable in under-chlorinated hot tubs. The resort agreed to a sentence of record, whose terms included payment of thousands of dollars for an independent testing laboratory to monitor conditions at the resort through surprise inspections. In addition, the resort received a $10,000 suspended fine and two years of probation during which it must not have any criminal violations of law or violate any regulations relating to environmental health.

Lewis indicted for shooting pipeline. A Fairbanks grand jury indicted Daniel Carson Lewis on charges of criminal mischief in the first degree, assault in the third degree, and felony drunk driving. The state also charged Lewis with misdemeanor counts of oil pollution and misconduct involving a weapon in the fourth degree. Lewis is accused of shooting a hole in the Trans-Alaska Pipeline, resulting in a release of over a quarter of a million gallons of crude oil to the environment and an interruption of Alyeska services. Associated costs will run into the many millions of dollars.

Two sentenced for welfare fraud. On October 15, 2001, Tammy Foreman was sentenced on one count of theft in the second degree. She received 12 months with all suspended and is required to pay full restitution in the amount of $11,458.26. She is also required to perform 100 hours of community work service and apply for and assign her Permanent Fund Dividend checks. During the period of August 1995 through August 1996, Foreman fraudulently received public assistance by failing to disclose household income.

On October 30 Gerald Stevens was sentenced on one count of theft in the second degree. He received a suspended imposition of sentence, with three years probation, 60 hours of community work service, and full restitution in the amount of $3,144. He is also required to apply for and assign his Permanent Fund Dividend checks. During the period of October 1997 through December l997, Stevens fraudulently received public assistance by failing to disclose all of his employment income.

Petitions & Briefs of Interest

Petitions of Interest

Protective frisk for weapons – scope. In a petition for hearing to the Alaska Supreme Court, the state argues that when a police officer, during a valid protective frisk, feels in the suspect's shirt pocket a hard, pointed, three-inch-long object that he cannot otherwise identify – and which the suspect himself also professes not to be able to identify – the officer can take the minimally intrusive step of looking in the pocket. In the petition, the state argues that the court of appeals misapplied the holding of *Jackson v. State*., 791 P.2d 1023 (Alaska App. 1990). *Jackson* says that a police officer, during a valid protective frisk, cannot search for atypical weapons unless he or she has specific and articulable facts that would justify a reasonable suspicion that the suspect is concealing an atypical weapon. *State v. Wagar*, No. S-10369.

Briefs of Interest

Post-conviction relief – prohibition on successive applications. The state argues that the court of appeals erred in creating an exception to the statutory prohibition on successive applications for post-conviction relief. In *Grinols v. State*, 10 P.3d 600 (Alaska App. 2000), the court of appeals held that, in spite of the clear statutory prohibition, a

prisoner has a right to file a successive application limited to the question whether the attorney who represented him in connection with his first application was ineffective. The state petitioned for hearing, and the supreme court granted the petition, as well as Grinols' cross-petition. *State v. Grinols*, No. S-9939.

Court Decisions of Note - Alaska

Right to telephone relative after arrest. By permitting the defendant to telephone his wife from a pay phone at the scene of his arrest for drunk driving, the arresting officer fully satisfied the defendant's right under AS 12.25.150(b) to telephone a relative; the officer was not required to permit the defendant to make a second telephone call to his wife after they arrived at the police station. *Moses v. State*, Op. No. 1767 (Alaska Court of Appeals, 10/5/01).

Collateral estoppel – prior determination in parallel administrative proceeding. Where a hearing officer in an administrative license revocation proceeding had *sua sponte* dismissed the revocation proceeding on the ground that the defendant had not been permitted to telephone his wife from the police station, the state was not foreclosed by collateral estoppel from litigating, in the criminal case, the question whether the police had violated the defendant's rights under AS 12.25.150(b). In reaching this conclusion, the court of appeals emphasized (1) that the defendant had not raised the issue of compliance with AS 12.25.150(b) in the revocation proceeding; (2) that the hearing officer had not given the parties an opportunity to litigate this question; and (3) that the hearing officer appeared to have dismissed the revocation proceeding on policy grounds, rather than legal grounds. *Moses v. State*, Op. No. 1767 (Alaska Court of Appeals, 10/5/01).

Due process – videotaping of DWI processing. The government's decision not to video-tape the defendant's DWI processing (the processing was audio-taped) was not reversible error, particularly given the defendant's failure to explain how a videotape of the processing would have profited him. *Moses v. State*, Op. No. 1767 (Alaska Court of Appeals, 10/5/01).

Right to independent blood test – waiver. Where the defendant knew he had been arrested for drunk driving, knew he had a right to an independent blood test, and knew that the purpose of the independent test was to obtain evidence of his blood-alcohol level, the defendant's understanding was sufficient to justify a determination that he made a knowing and valid waiver of the right. *Moses v. State*, Op. No. 1767 (Alaska Court of Appeals, 10/5/01).

Prior misconduct evidence – use of prior sexual assault to establish identity. In a prosecution for sexual assault where the defendant asserts an identity defense, rather than a consent defense, evidence of a prior sexual assault by the defendant is admissible under Alaska Evidence Rule 404(b) to establish the defendant's identity as the assailant only if the prior sexual assault "bears a striking enough similarity to the crime being litigated that [it takes] on a probative aspect above and beyond the fact that the defendant might be a repeat rapist." The prior sexual assault need not, however, be so distinctive as to represent the defendant's "signature." In this case, the court concluded that one of the defendant's prior sexual assaults was similar enough to justify admission, but the other was not. *Nicholia v. State*, Op. No. 1769 (Alaska Court of Appeals, 10/12/01).

Harmless error. The erroneous admission of a prior sexual assault at the defendant's trial for sexual assault was harmless in light of: (1) the fact that the judge instructed the jury not to consider the evidence for any purpose other than to establish a "characteristic method, plan or scheme"; (2) the defendant's failure to cast any doubt on the victim's testimony identifying the defendant as her attacker; and (3) the admission of another prior sexual assault that

was far more probative of the defendant's guilt. *Nicholia v. State*, Op. No. 1769 (Alaska Court of Appeals, 10/12/01).

Violating protective order – clerical error. A "clerical error" in a domestic violence protective order cannot be raised as a defense to a charge of violating the protective order. In this case, the judge wrote on the order that its effective date was "1/7/97." But the order was issued on January 7, 1998, and it obviously was intended to take effect on that day. The court of appeals held that the defendant was not entitled to an acquittal on this basis, and indeed was not even entitled to argue the point to the jury. The court said the construction of the order was a legal matter for the trial judge, and that the court's construction of the order as taking effect on January 7, 1998, was correct. *Lampley v. State*, Op. No. 1768 (Alaska Court of Appeals, 10/12/01).

Defendant's right to represent himself – likelihood of disruption. Even if a defendant is capable of presenting a coherent case, a court can nevertheless deny his request for self-representation if the defendant is not capable of conducting his defense without being unusually disruptive. In this case, the defendant twice threatened to kill the judge during questioning by the judge about the defendant's desire to represent himself. The court of appeals held that these threats justified a determination that the defendant would probably be disruptive in front of the jury. *Lampley v. State*, Op. No. 1768 (Alaska Court of Appeals, 10/12/01).

Sentencing – violation of protective order. A defendant's composite sentence of 20 months to serve for 13 counts of violating a domestic violence protective order was not excessive given the defendant's history of domestic violence assault and disregard of domestic violence protective orders. *Lampley v. State*, Op. No. 1768 (Alaska Court of Appeals, 10/12/01).

Rule 45 – rejection of Rule 11 agreement. Where a defendant enters a plea of guilty or no contest as part of a plea bargain that includes a sentencing cap, but the trial judge subsequently rejects the sentencing cap and permits the defendant to withdraw his plea, the time for trial under Criminal Rule 45 begins running anew from the date the defendant withdraws his plea. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Harmless error – jury instructions. Rhetorical errors in jury instructions can be made harmless by the parties' closing arguments. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Stalking – jury unanimity. In prosecution for first-degree stalking, it was not obvious that jury was required to be unanimous as to which instances of nonconsensual contact had been proved, or as to which individual acts violated the terms of a protective order. Therefore, the trial court did not commit plain error in failing to instruct the jury that such unanimity was required. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Lesser included offenses – plain error. When the parties do not request jury instructions on lesser offenses, a trial judge does not commit plain error by failing to instruct the jury, *sua sponte*, on potential lesser included offenses. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Trial procedure – questioning by judge. The trial judge did not abuse his discretion when, during defense counsel's cross-examination of the victim concerning one portion of a protective order, the judge took steps to apprise the jury of another, seemingly contradictory portion of the same order. The judge probably erred, though, in the method by which he apprised the jury of this portion of the order. Instead of ordering defense counsel to read this portion of the order aloud, the judge should simply have directed a question to the witness. But this minor error did not require a mistrial, nor was this error so indicative of bias as to require the judge thereafter to recuse himself.

Cook v. State, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Judicial disqualification. Judge assigned to ongoing criminal case was risking disqualification when he presided in an *ex parte* civil proceeding in which the victim was seeking a domestic violence protective order against the defendant. This time, though, disqualification was not required since the judge learned nothing from the *ex parte* application that he didn't already know from the criminal case. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Evidence – motive to stalk. Trial judge did not abuse his discretion by permitting the state to introduce, at the defendant's trial for stalking, evidence that the defendant (1) had contacted the court clerk in an effort to find out to where the victim had relocated and (2) had asked the court to modify a protective order to permit him to contact the victim. *Cook v. State*, Op. No. 1770 (Alaska Court of Appeals, 10/26/01).

Investigatory stops – authority to detain passengers. The Alaska Supreme Court dismissed as improvidently granted the state's petition for hearing in *State v. Castle*, No. S-9693. In its petition, the state had argued that a police officer who validly stops a vehicle and finds that the driver is committing a serious traffic offense (*e.g.*, driving with a revoked license) has the authority to briefly detain the passengers, who are witnesses to the offense. Two justices dissented from the order dismissing the state's petition. They said "[s]trong support exists for a rule that would allow an officer to briefly detain passengers in these circumstances." Their dissent suggested that the court's reason for dismissing the petition was that "the facts of this case present[ed] alternative grounds for affirmance." *State v. Castle*, No. S-9693 (unpublished order, 10/26/01).